U.S. Department of Labor

Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)

Issue Date: 23 December 2003

BALCA Case No.: 2002-INA-225
ETA Case No.: P2000-NY-02475499

In the Matter of:

JOSE & ZENAIDA CORDERO,
Employer,

on behalf of

RODEL L. SANTOS,
Alien.

Appearance: Modesto L. Balahadia, Esquire
Staten Island, New York
For Employer

Certifying Officer: Dolores Dehaan
New York, New York

Before: Burke, Chapman, and Vittone
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This case arises from an application for labor certification on behalf of Rodel L. Santos ("Alien") filed by Jose & Zenaida Cordero ("Employer") pursuant to §212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. §1182(a)(5)(A)("the Act"), and the regulations promulgated thereunder, 20 C.F.R. Part 656. The Certifying Officer ("CO") denied the application, and Employer requested review pursuant to 20 C.F.R. §656.26.

The following decision is based on the record upon which the CO denied certification and Employer's request for review, as contained in the Appeal File ("AF"), and any written arguments of the parties. 20 C.F.R. §656.27(c).

STATEMENT OF THE CASE

On March 7, 2001, Employer, Jose & Zenaida Cordero, filed an application for labor certification on behalf of the Alien, Rodel L. Santos, for the position of Live-in Cook. (AF 6). The only stated job requirement for the position was two years experience in the job offered. However, the job title was Live-in Cook; the rate of pay reflected an hourly rate plus free private room and board. Accordingly, it is apparent that Employer also has a live-in requirement for the job opportunity. (AF 6).

In a Notice of Findings ("NOF") issued on February 15, 2002, the CO proposed to deny certification on the grounds that the live-in requirement was unduly restrictive and Employer failed to establish that there is a bona fide job opportunity clearly open to U.S. workers. (AF 35-38).

Employer submitted its rebuttal on or about March 22, 2002. (AF 39-48). The CO found the rebuttal unpersuasive and issued a Final Determination ("FD"), dated April 12, 2002, denying certification on the same basis. (AF 49-51). On or about May 21, 2002, Employer requested review of the FD and submitted additional documentation in support thereof. (AF 52-69). The matter was docketed in this Office on June 14, 2002.

DISCUSSION

Twenty C.F.R. §656.20(c)(8) requires that the job opportunity has been and is clearly open to any qualified U.S. worker. This regulation also entails a requirement that a "bona fide" job opportunity truly exists. *See, e.g., Pasadena Typewriter & Adding Machine, et al v. U.S. Department of Labor*, No. CV 83-5516-AABT (C.D. Cal. 1987); *Amger Corp.*, 1987-INA-545 (Oct. 15, 1987)(*en banc*).

In the NOF, the CO requested that Employer provide information in order to help ascertain whether the job opportunity is bona fide, while noting that merely answering all of the questions does not insure approval of the application. (AF 35-37). Specifically, the CO requested information regarding the daily schedule of the people in the household and the daily duties of the position. The CO inquired as to special dietary requirements and child care arrangements. The CO also wanted to know Employer's entertainment schedule and the cook's role in preparing food for Employer's guests. In addition, the CO requested information about Employer's income, specifically tax returns, to determine the percentage of Employer's income that would be devoted to paying the worker's salary. The CO also inquired as to other domestic workers employed in the household and whether Employer had ever employed a domestic cook. (AF 36-37).

Employer's rebuttal consisted of a cover letter by Employer's counsel, dated March 18, 2002 (AF 48); Employer's letter, dated March 18, 2002, which sought to address the questions outlined above (AF 45-47); a handwritten medical note on a prescription pad by Dr. Victoriosa Pasignasen, dated March 18, 2002 (AF 44); a drug-company information pamphlet entitled "Choose your low-cholesterol, heart-healthy diet" (AF 43); and copies of Employer's Federal income tax returns for the years 1999 and 2000. (AF 39-42).

In the Final Determination, the CO found that Employer's rebuttal did not adequately

address all these questions. In summary, the CO stated:

> According to rebuttal information the household is presently comprised of the employer and her spouse, her mother, her son and two daughters one of whom is a college student and the other whom employer indicates is married. It is not clear where the married daughter's spouse or family resides; however, while employer provided the daily work schedules for herself, her spouse and her son, she failed to provide the daily school schedule of the daughter who attends college and the daily schedule of her married daughter (and possibly the married daughter's family). In addition, employer failed to provide a detailed entertainment schedule as requested by the Notice. Further, employer indicates one hour is required for breakfast, one and a half hours for lunch and three hours for dinner. This is equivalent to a five & a half hour day which is less than full-time work and part-time employment is not certifiable. Employer has failed to adequately establish that the position offered is bona fide.

(AF 50). We agree.

As outlined above, in the NOF, the CO explicitly directed Employer to provide the following information:

> How frequently do you entertain? Describe in detail how often you entertained in the **twelve (12)** ***calendar months*** immediately preceding the filing of the application. List the dates of the entertainment, the number of guests entertained, the number of meals served, etc. To what extent will the **Domestic Cook** be involved in preparing food for guests?

(AF 37).

Employer's "rebuttal" regarding this question was limited to the following statement:

> My husband and I are also involved in social and charity works in the community and we have meetings at home at least two times a month. In all these occasions, our cook have [sic] to prepare the food for our guests.

(AF 46).

We find that Employer's cursory rebuttal statement clearly does not comply with the CO's reasonable request to provide the above-referred detailed, relevant information regarding Employer's entertainment schedule.

An employer must provide relevant and reasonably obtainable sought by the CO and failure to do so constitutes grounds for affirming the denial of certification. *See, e.g., Gencorp.*, 1987-INA-659 (Jan. 13, 1988)(*en banc*); *Super Super, Inc.*, 1994-INA-604 (Aug. 29, 1995); *Rainbow Imports, Inc.*, 1988-INA-289 (Oct. 27, 1988). Employer's response regarding their entertainment schedule failed to satisfy the CO's reasonable request for documentation. Employer cannot answer a request for a detailed schedule with an assertion that Employer hosts meetings twice a month.

With the request for review, Employer submitted an entertainment schedule with the dates of parties, the number of guests attending, and the number of meals the worker would need to prepare for these occasions. (AF 54-57). We decline to consider the new evidence submitted by Employer with its request for review because such evidence should have been provided prior to the issuance of the FD and is not properly before us on appellate review. *See, e.g., Meta Engineers, P.C.*, 1995-INA-415 (July 2, 1997); *Francisco Potestas*, 1994-INA-204 (Apr. 26, 1995); *Memorial Granite*, 1994-INA-66 (Dec. 23, 1994); *see also* 20 C.F.R. §656.26(b)(4). Employer gave no justification for the failure to provide this evidence when requested by the CO and thus, the evidence is untimely and will not be considered.

We also affirm the denial of certification on the grounds that Employer failed to adequately document that the live-in requirement arises out of business necessity. As stated in the FD:

> Notice of Findings determined that the requirement that the worker live-in was unduly restrictive and held that the circumstances of employer's household did not appear to justify the need for a live-in worker. Employer was advised that it appeared the duties could be performed by a live-out

> worker during a normal live-out work schedule. Employer was requested to rebut by amending the application or by documenting business necessity for the live-in requirement. In rebuttal, employer merely reiterates the live-in work schedule and indicates the arrangement is needed due to her family's busy and erratic schedule. Employer's failure to provide the daily work and/or school schedule for all household residents precludes a determination that all family members have a "busy and erratic" schedule to the extent that it would warrant the Cook to live-in. The documentation submitted fails to adequately establish business necessity for the live-in requirement.

(AF 49-50).

Employer did not comply with the CO's reasonable request for relevant information regarding the live-in issue because it failed to address the live-in requirement in rebuttal. (AF 45-48). Employer stated only that the Alien's schedule would be from 8 a.m. until 7 p.m., with two hours rest, Monday through Friday, and 8 a.m. to 12 p.m. on Saturday. (AF 46). However, Employer did not indicate how this schedule would require the Alien to reside in Employer's household. In fact, the Alien's schedule is less demanding than Employer's husband's work schedule (leaving home at 5:30 a.m. and returning at 5:30 p.m.). Employer has not established the need for the live-in requirement. Furthermore, Employer's offer in the Request for Review to delete the requirement and/or readvertise is belated. (AF 53). An offer to cure such a deficiency after the issuance of the FD is untimely and the CO's denial of certification will be upheld. *See Nancy Vera*, 1993-INA-63 (Dec. 16, 1993). Accordingly, the denial of labor certification was appropriate on these grounds.

In summary, Employer failed to furnish sufficient, credible documentation to establish that there exists a bona fide job opportunity open to qualified U.S. workers, in violation of 20 C.F.R. §656.20(c)(8); and/or, to establish the business necessity for the live-in requirement, in violation of 20 C.F.R. §656.21(b)(2)(i). In view of the foregoing, we find that labor certification was properly denied.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED.**

Entered at the Direction of the Panel by:

A

Todd R. Smyth
Secretary to the Board of
Alien Labor Certification Appeals

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within ten days of the service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of the petition the Board may order briefs.